Mburuto v Wanjiku & another (Environment and Land Appeal 3 of 2017) [2025] KEELC 1422 (KLR) (20 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1422 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ENVIRONMENT AND LAND APPEAL 3 OF 2017

JM MUTUNGI, J

MARCH 20, 2025

BETWEEN

FREDRICK MUCHIRI MBURUTO .... APPELLANT

AND

GRACE WANJIKU .... 1ST RESPONDENT

JOSEPH KINYUA KARUMBA .... 2ND RESPONDENT

(Being an Appeal from the Ruling and subsequent Orders of Hon. Y. M. Barasa, Resident Magistrate in Kerugoya Principal Magistrate's Court Land Disputes Tribunal Case No. 10 of 1999 (L.D.T No. 10 of 1999) delivered and dated 31st March 2017)

JUDGMENT

1. This Appeal is against the Ruling delivered by Hon. Y. M. Barasa (R.M) on 31st March 2017 in Kerugoya LDT No. 10 of 1999. By the Ruling, the Learned Trial Magistrate dismissed the Appellant's application dated 25th October 2010, which sought a review of the order of the Magistrate's Court entering Judgement in terms of the Kirinyaga Land Disputes Tribunal Award, the decision of the Central Province Appeals Committee and all consequential orders and decrees and set them aside for being null and void for want of jurisdiction on the part of the Tribunal. The Learned Magistrate by the said Ruling dismissed a Preliminary Objection taken by the Appellant with regard to the 1st Respondent's application dated 5th November 2010 but granted the application by the 1st Respondent dated 5th November 2010 where she sought execution of the impugned Judgement entered by the Magistrate's Court on 16th October 2001.

2. The Appellant aggrieved and dissatisfied with the Ruling of he Learned Magistrate has appealed against the said Ruling and by the Amended Memorandum of Appeal dated 3rd March 2022 raised 8 grounds of appeal as follows:-

1. The Learned Resident Magistrate erred in law and in fact in declining to review and set aside its order entering Judgment in terms of the award of the Land Disputes Tribunal that purported to determine the issue of ownership of land parcel No. Inoi/Kariko/752 registered in the name of the Appellant under the Registered *Land Act* (now repealed) when it is trite law that the Tribunal did not have the jurisdiction to do so and its decision was therefore null and void ab initio and incapable of lawfully being effected as stated by the Appellant in his written objection dated 25th October 2010.
2. The Learned Resident Magistrate erred in Law and in fact in failing to appreciate that he had a legal obligation to review its order adopting the tribunal's award as its Judgment with a view of setting it aside as the same was null and void to the extent that its effect was to interfere with the title to the suit land No. Inoi/Kariko/752 without jurisdiction as was held in the case of Asman Maloba Wepukhuls & Wycliff Barasa Vs. Francis Wakwabubu Biketi, Court of Appeal at Kisumu, Civil Appeal No. 157 of 2001.
3. The Learned Resident Magistrate erred in law and, in fact, in failing to appreciate that it was necessary to review its Judgment adopting the award of the Land Dispute Tribunal as one Purity Wahito who was not a party to the suit had acquired registration by virtue of execution of orders of a court of concurrent jurisdiction.
4. The Learned Resident Magistrate erred in law and in fact in failing to appreciate that a Court of concurrent jurisdiction, J. Kasam, Ag S.R.M. had in Kerugoya Senior Principal Magistrate's Court Civil Suit No. 90 of 2002 involving him determined the ownership of the land in dispute in favour of the Appellant.
5. The Learned Resident Magistrate erred in law and in fact by holding that the disputed land, namely parcel No. Ino/Kariko/752 was not registered in the name of Purity Wahito, who was not a party to the matter before him, in spite of uncontroverted Affidavit evidence to which a copy of the register was annexed showing the reverse to be the case.
6. The Learned Resident Magistrate erred in law and in fact by misapprehending the orders of the High Court in Meru Civil Appeal No. 122 of 201 and their legal effects and thereby made wrong decisions in the matter before him.
7. The Learned Resident Magistrate erred in law and in fact in failing to uphold the application for review and set aside the award of the Land Disputes Tribunal which was null and void ab initio as requested by the Appellant in his application dated 25/10/2010 and further erred in law and in fact in dismissing the said application on a technicality.
8. The Ruling/Orders of the Learned Resident Magistrate are contrary to Law and Justice.

3. The Appellant prayed that the Ruling/Order issued on 31st March 2017 be set aside and be substituted with an order allowing the Appellant's application dated 25th October 2010.

4. The background to this matter is that the 1st Respondent initially lodged a complaint in the Kirinyaga Land Disputes Tribunal, which was decided in her favour. The Appellant appealed the decision at the Central Province Land Appeals Committee, which upheld the decision of the tribunal. In its Ruling, the Committee noted:

> " This panel uphold the Ruling of Kirinyaga Land Tribunal that:
>
> 1. Land Inoi/Kiriko/752 be re-enstated (sic) back to Joseph Kinyua Karumba for the sake of children and wife.

2. The next title deed to include Grace Wanjiku. It must be issued to Grace Wanjiku and Joseph Kinyua Karumba jointly.

   The Land Registrar be requested to facilitate the transaction. The aggrieved may Appeal in a Court of Law but on a point of Law within 60 days from the date of signing this document."

5. Dissatisfied with the decision of the Appeals Committee, the Appellant filed an Appeal against the decision at the High Court in Meru, under Civil Appeal No. 122 of 2001. The High Court in Meru delivered a Judgment on 28th February 2006. In the Judgment, the Learned Judge held that the 2nd Respondent had improperly been joined in the Appeal and struck out his name. Further, the Judge held the Appeal had been filed out of time and was therefore statute barred and proceeded to strike out the Appeal. In effect the Appellant reached a dead-end in his pursuit of his options under the provisions of the Land Disputes Tribunal *Act No. 18 of 1990*. It was after exhausting the options he had under the said Act that he reverted to the Magistrate's Court that consequently had endorsed the award as judgement of the Court, with the application dated 25th October 2010 seeking a review of the order adopting the award as Judgement.

6. The Appellant vide the application dated 25/10/2010, prayed for the following orders:-

   1. That this honourable Court be pleased to review its order entering Judgment in terms of Kirinyaga Land Disputes Tribunal's award, the award of the Central Province Appeals Committee and all consequential orders and all decrees and set them aside.

   2. That the claimant be condemned to pay the costs of this application.

7. The Appellant in support of the application contended that the decision made by the Land Disputes Tribunal, which was adopted as a Judgment by the Magistrate Court, did not include the necessary depositions or documents presented or proven before the Land Disputes Tribunal, as provided under Section 7 of the Land Disputes Tribunals *Act No. 18 of 1990*. The Appellant further contended that the Land Disputes Tribunal, despite lacking the jurisdiction to determine ownership or title to land, incorrectly addressed issues of ownership regarding the land parcel Inoi/Kariko/752. The Appellant contended that the Tribunal's Judgment was legally invalid, and therefore, the Magistrate Court had no authority to adopt it as a Judgment. He asserted that the decision that was adopted as the Court's Judgment constituted either a mistake or an error on the face of the record, thus providing sufficient grounds for a review.

8. In response, the 1st Respondent filed her Replying Affidavit, stating that the Magistrate's Court was functus officio and lacked jurisdiction to issue the orders sought. The 1st Respondent asserted that the Magistrate's Court did not have the authority to review or set aside an award, as that was solely within the jurisdiction of the High Court. Additionally, the 1st Respondent argued that the Appellant had filed an Appeal, Civil Appeal No. 122 of 2001, in the High Court at Meru, which was struck out for having been statute barred and contended the Appellant could not revert to the Magistrate's Court for review.

9. The 1st Respondent contended that the Magistrate's Court did not have jurisdiction to deal with a review application arising from any decisions of the Land Disputes Tribunal as that was the preserve of the High Court under its Judicial Review jurisdiction under Order 53 of the Civil Procedure Rules.

10. The 1st Respondent also filed an application dated 5/11/10 seeking the following orders:

1. That the Executive Officer be authorized to sign the necessary documents to facilitate the transfer of land parcel No. Inoi/Kariko/752 as per the Judgment entered on 16/10/01 in this case.

2. That the production of the old title deed at the Land Registry in respect to L.R No. Inoi/Kariko/752 be dispensed with.

3. Cost of this application be provided.

11. The 1st Respondent premised her application on the grounds that the Award was read on 16th October 2001 and that Judgment was entered. She stated that by the Judgment, the Appellant was ordered to transfer land parcel No. Inoi/Kariko/752 to her and the 2nd Respondent. She further contended that the Appeal filed by the Appellant in Civil Appeal No. 122 of 2001 at Meru had been dismissed on 26th February 2006 and asserted that there was nothing pending that would prevent the execution of the award.

12. In response, the Appellant filed a Replying Affidavit sworn on 26th November 2010 together with a Preliminary Objection that the Tribunal's award was inter alia null and void having been made by the Tribunal when it lacked jurisdiction.

13. On 31st March 2017, the Learned Trial Magistrate delivered the contested Ruling. He addressed both the Appellant's Preliminary Objection and the two applications simultaneously. Regarding the Appellant's Preliminary Objection, the Learned Trial Magistrate noted that the grounds presented in the objection suggested that the Court would need to examine various documents to establish facts. He determined that these matters were evidentiary issues and could not be raised in a Preliminary Objection. As a result, he dismissed the Preliminary Objection.

14. In relation to the application for review, the Learned Trial Magistrate observed that the Appellant did not include the specific order he wished to have reviewed in either the supporting or further Affidavit. As a result, the Learned Trial Magistrate dismissed the application. Regarding the 1st Respondent's application, the Learned Trial Magistrate noted that the Judgment of Hon. Kasam did not grant ownership of the land to Purity Wahito and held that the annexed abstract of title did not indicate that Purity Wahito was the registered owner of the disputed land. Consequently, the Learned Trial Magistrate granted the 1st Respondent's application dated 5th November 2010.

15. The Appeal was argued by the parties by way of written submissions. I have reviewed and consequently considered the submissions, and the various authorities cited by the parties in support of their positions. I have equally reviewed the Record of Appeal and the applications and the Ruling giving rise to the present Appeal. The following issues arise for determination in this Appeal:-

    i. Whether the appellant had exhausted the process of Appeal provided under the Land Disputes Tribunal Act, Cap 303A Laws of Kenya?

    ii. Whether an application to review a judgement entered by the Magistrate's Court under Section 7 of the Act could be maintained by the Magistrate's Court.

    iii. Whether the learned trial Magistrate erred in failing to grant the order for review and set aside the Judgment.

16. The Land Disputes Tribunal Act (now repealed) had a clearly spelt out procedure for dispute resolution. Section 8(1) of the Act provided as follows:-

8(1)Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.

17. The decision of the Appeals committee under Section 8(8) was final on issues of fact and no appeal was allowed to any Court. However, on issues of law an appeal could be preferred from a decision of the Appeals Committee to the High Court pursuant to the provisions of Section 8(9) of the Act. I set out hereunder the provisions of Section 8(8) and (9) for context:-

8(8) The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any Court.

8(9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of:

Provided that no Appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law (other than customary law) is involved.

18. As per the record, the Appellant after the Disputes Tribunal made its decision, the Appellant appealed the decision to the Provincial Appeals Committee, Central Province who heard the Appeal and rendered the decision signed on 8th August 2001. The Appellant clearly lodged an appeal to the High Court against this determination by the Appeals Committee vide Meru High Court Civil Appeal No 122 of 2001. Hon. Justice Lenaola (as he then was) heard the Appeal and struck the same out with costs for having been filed out of time and without leave of the Court.

19. It is my view the Appellant exhausted the remedies he had under the Land Disputes Tribunal Act and I do not consider that he could turn the wheel back and start the process all over as though there was nothing that happened before the Appeals Committee and the High Court. The Administration of Justice cannot be on the basis of trial and error. Parties are bound by the procedures and processes established by Acts of Parliament and once such processes are invoked there has to be finality. The Appellant chose to pursue the Appeals procedure established under the Land Disputes Tribunal Act and he remains bound by the outcome. It cannot be that the actions the Appellant took to lodge an Appeal to the Appeals Committee and the High Court counted for nothing.

20. Besides, the Magistrate's jurisdiction under Section 7 of the Land Disputes Tribunal Act, was limited to receiving the decision from the Tribunal and entering Judgment in accordance with the decision of the Tribunal. The Magistrates were not expected to interrogate the decision from the Tribunal in any manner. Any issue relating to the jurisdiction of the Tribunal could only be taken by way of Judicial Review before the High Court under the provisions of Order 53 of the Civil Procedure Rules and Sections 8 and 9 of the *Law Reform Act*, Cap 26, Laws of Kenya.

Section 7 of the Land Disputes Tribunals Act provides as follows:-

7(1) The Chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the Magistrate's Court together with any depositions or documents which have been taken or proved before the Tribunal.

(2) The Court shall enter Judgment in accordance with the decision of the Tribunal and upon Judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the *Civil Procedure Act*.

21. The Appellant has in support of the Appeal cited various Court decisions where the Courts have held that where the Land Disputes Tribunal acted without jurisdiction, their decisions were null and void and proceeded to quash them. The Appellant cited Nairobi HC Misc Civil Application No 1279 of

2004 – Judicial Commission of Inquiry and 3 others; Exparte Hon Jackson Mwalulu & 7 others to support his argument that where an act is illegal and a nullity on account of want of jurisdiction, there was no time limit prescribed by Order 53 rule 2 of the Civil Procedure Rules within which an action could be instituted to quash any such illegal or null decision.

22. The Appellant cited the case of Njage Githinji v Mbogo Karugendo (Embu Hc Civil Appeal No 41 of 2001) where in an Appeal challenging the jurisdiction of the Provincial Appeals Committee in ordering the subdivision and transfer of the Appellant's land which was registered under the Registered *Land Act* Cap 300, Laws of Kenya (now repealed). In determining the Appeal, Lady Justice J.N Khaminwa held that the issues raised before the Tribunal and the Appeals Committee related to title registration and that under Section 3(1) of the Land Disputes Tribunal Act,1990 Tribunals had no power to deal with ownership of registered land. She held the tribunal had acted in excess of its jurisdiction and allowed the Appeal, set aside the decision of the Tribunal including the order of the Magistrate's adopting the Tribunals decision as a decree of the Court.

23. In the case of Asman Maloba Wepukhulu and another v Francis Wakwabubi Biketi (Kisumu CACA No 157 of 2001) also cited by the Appellant, the Court of Appeal upheld the decision by Mbito, J of the High Court where he had quashed the orders made by Misikhli Land Disputes Tribunal on the ground that the Tribunal lacked jurisdiction and had acted illegally in determining issues relating to title of the suit land. The Court of Appeal further held the Learned Judge properly quashed proceedings before the Tribunal and the decision of the Magistrate's Court giving effect to the decision of the Tribunal.

23. It is noteworthy that in all the cases referred to by the Appellant, the parties had invoked the Dispute Resolution Mechanism under the Land Disputes Tribunal Act. Indeed, the Appellant himself had invoked the same Dispute Resolution Mechanism under the Act when he appealed to the Provincial Appeals Committee, and subsequently to the High Court. I am of the view that once the Appeal Mechanism provided under the Act was exhausted, the Appellant could not properly go back to the Magistrate's Court to apply for review. The Magistrate had no review jurisdiction under the Act. Only the High Court could entertain a Judicial Review application under the auspices of Order 53 of the Civil procedure Rules and Section 8 and 9 of the *Law Reform Act*, Cap 26 Laws of Kenya.

24. The application for review therefore did not lie before the Magistrate's Court and it was an exercise in futility. Even if an application for review was entertainable before the Learned Magistrate, which it was not, the Appellant's application would have been bound to fail as it could not satisfy the conditions under the Order 45 Rule (1) (b) under which review could be granted. The Appellant in his application was in effect challenging the Magistrate's decision in regard to his application of the Law in erroneously endorsing the Tribunal's award when the Tribunal acted without jurisdiction. The case of the National Bank of Kenya v Ndungu Njau (CACA No 2111 of 1996) [1997] eKLR and the Case of Nyamongo & Nyamongo v Kogo [2001] EA 170 aptly explain what would be said to constitute error on the face of the record to warrant a review order. In the National Bank case the Court of Appeal held:-

> "A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view if the matter, nor can it be a ground for review that the Court proceeded on an incorrect exposition of the Law."

25. In the Nyamongo case the Court considered what would constitute an error on the face of the record and stated thus:-

> " An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature, and it must be determined Judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long-drawn process of reasoning points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for Appeal."

26. In the instant matter the Appellant before the Lower Court sought review of the order entering Judgment in terms of the Tribunal's award which the Magistrate made on the 16th October 2001. As discussed earlier the Magistrate was not required to make any decision after the award was filed. Section 7(2) of the Act was couched in mandatory terms as follows :-

    7(2) The Court shall enter Judgment in accordance with the decision of the Tribunal and upon Judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the *Civil Procedure Act*.

27. There was therefore no decision made by the Magistrate that could be the subject of a review application. A party aggrieved by the decision of the Tribunal could only appeal to the Appeals Committee

    and/or could apply for Judicial Review to the High Court to quash the decision of the Tribunal. There was therefore in essence no competent application for review before the Learned Trial Magistrate. Though for different reasons the Learned Trial Magistrate, rightly dismissed the application for review.

28. The upshot is that the Appeal before this Court is devoid of merit and is accordingly dismissed with costs to the Respondents.

JUDGEMENT DATED SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 20TH DAY OF MARCH 2025.

J. M. MUTUNGI

ELC - JUDGE